 ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	**CC Docket No. 96-98**
Local Competition Provisions in the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF SPRINT CORPORATION

Many of the arguments made by the parties that support placing use restrictions on loop and transport UNEs – principally the RBOCs and GTE – were anticipated in Sprint's initial comments in this proceeding. In those comments, Sprint argued that (a) the plain language of §251(c)(3), as well as unchallenged portions of the First Report and Order in this proceeding,[1] preclude the ILECs from imposing use restrictions on UNEs; (b) neither the "just and reasonable" terms of §251(c) nor the provisions of §251(g) would permit restrictions on the use of UNEs; and (c) the Commission has long since concluded that special access and switched transport rates are not sources of universal service support. The contrary arguments of the RBOCs and other supporters of UNE use restrictions are wholly without merit.

The principal argument advanced in support of use restrictions is that, because of the availability of tariffed special access services from the ILECs and competitive access services from CLECs or CAPs, IXCs are not impaired by their inability to obtain special

[1] 11 FCC Rcd 15499 (1996) (subsequent history omitted).

access facilities at UNE prices. In this context, U S West (at 24) and SBC (at 7-10) argue that the §251(d)(2) impairment test – which focuses on a requesting carrier's "ability to provide the services it seeks to offer" – requires service-by-service analysis, and that no such analysis of special access needs has been undertaken. Rather, they claim (*id.*), the Commission's findings in the UNE Remand Order (FCC 99-238, released November 5, 1999) focused on the provision of local exchange service to the mass market.

In the UNE Remand Order, the Commission clearly rejected arguments that it must analyze impairment on a service-by-service basis. Thus, the Commission found (¶53, footnote omitted) that "the Act is not calibrated to the performance of the company whose business plan allows it to rely the least on the incumbent LEC's network elements." And in ¶54 (footnote omitted), the Commission held that "we cannot evaluate the needs of every potential carrier seeking access to each network element on a case-by-case basis." Furthermore, even though, arguably, one carrier, because of its ability to self-provision, might not be "impaired" at all, nothing in the UNE Remand Order precludes such a carrier from purchasing UNEs whose availability was based on the impairment suffered by others.

Nor is it true that the Commission's analysis of the need for specific UNEs in the UNE Remand Order focused solely on competition for mass market local service. The types of loops required include several that are only associated with special access services, rather than with local service to the "mass" market:

- Conditioned loops so that "requesting carriers" (not just CLECs) can provide xDSL services – services that substitute for ILEC special access (¶172).
- Dark fiber, which by its nature would only be used to provide extremely high bandwidth, special access type services to an end user (¶174).

- High-capacity loops (defined in §51.319(a)(1) to include "DS1, DS3, fiber, and other high-capacity loops").

Indeed, the Commission specifically rejected (in ¶176) ILEC arguments that high-capacity loops should be excluded from the definition of the loop UNE and (in ¶177) a U S West argument that it should exclude "the loop facilities that underlie private line and special access interconnection" so as to avoid arbitrage between access and UNE pricing. The Commission held that it has "not previously found that the requirements of section 251(c)(3) are limited to any particular kind of service," and found "no basis for placing a restriction on what services a carrier may offer using the loop network element" (*id.*, footnote omitted).

Likewise, the Commission's discussion of the unbundling of transport UNEs related to the needs of "requesting carriers" generally, not any specific type of requesting carrier or any particular type of service. *See*, *e.g.*, ¶¶321, 332, 333, 340. Even if the Commission had confined its analysis to the needs of carriers providing competitive local exchange service, the very same alternatives that are available to IXCs for their transport needs (ILEC special access, CAP-provided special access, or self-provisioning) are equally available to CLECs. Thus, any finding that the absence of such facilities impairs the CLECs' ability to offer local services would perforce be equally applicable to the IXCs' interexchange services. Moreover, in ¶67, the Commission brushed aside ILEC arguments that their tariffed services are adequate alternatives to UNEs, and specifically rejected the argument that ILECs need not unbundle local transport because requesting carriers can purchase tariffed special access services.

Contrary to SBC's argument, the analysis that led the Commission to conclude that the local switching UNE need not be provided in limited circumstances (providing

local service to medium and large business customers in high-density offices within the largest metropolitan areas, provided certain other facilities are supplied by the ILEC), does *not* support the placing of use restrictions on loop and transport UNEs. Aside from the questionable validity of that analysis, the Commission's findings with respect to the local switching UNE were predicated on an ability to self-provision in those limited circumstances. In the case of both loops and transport, by contrast, the Commission fully considered the extent to which self-provisioning was feasible and the extent to which facilities were available from competitive providers of facilities. Notwithstanding these alternatives, the Commission found that these UNEs should be available on a *nationwide* basis.

As for loops, in ¶184, the Commission dismissed the ILECs' assertions "that we should not unbundle high-capacity loops because competitive LECs have successfully self-provisioned loops to certain large business customers." The Commission also rejected (in ¶185) an argument that high-capacity loops need not be unbundled in high-density offices. In short, the Commission considered but rejected the approach that it took to the local switching.

With respect to transport, transport is transport, whether it is the transport of a local call or a long-distance call, or whether the call is going to a large business customer or an individual residential customer. Thus, there is no logical basis for differentiating transport facilities on the basis of the types of loops to which they are connected or the types of customers that use those loops. In any event, the Commission fully considered self-provisioning and alternative sources of supply, both generally and in high-density

markets, but nonetheless required these UNEs to be available nationwide without restriction (¶¶332-379).

Furthermore, the RBOCs' claim that IXCs do not need UNE transport and loops because they are "successfully" able to utilize special access services instead (*see*, *e.g.*, U S West at 4), begs the question. The IXCs' reliance on ILEC special access tariffs for provision of their services would be "successful" only if one were to ignore the fact that they are paying far higher than the forward-looking, cost-based rates that would result from a truly competitive market for this input to their services. Moreover, now that the §271 barrier has been breached by Bell Atlantic in New York, IXCs face the very real prospect of competition with the RBOCs for long-distance service to large business customers. The IXCs will not long be "successful" in the provision of these services if, for a critical input – the local special access portion of these services, they must continue to pay rates that are twice as much as the true, forward-looking costs that their RBOC competitors face. On the contrary, continued "successful" offering of interexchange services that utilize special access – as well as switched voice service for which transport services are required – requires that IXCs have access to loop and transport facilities at the same forward-looking costs that their RBOC competitors enjoy.

With respect to the "just and reasonable conditions" language of §251(c)(3), the RBOCs and their allies ignore the quarter century history, dating back to the early *Resale and Shared Use* decision cited in Sprint's comments, of Commission findings that use restrictions are *un*just and *un*reasonable. Instead, they attempt to fashion an argument that the Commission has already prohibited substitution of UNEs for access services in the form of restrictions on loops and local switching and that this forms a precedent for

public interest restrictions against arbitrage between UNEs and access services.[2] This argument rests on a gross misinterpretation of the prior Commission orders in this docket. In ¶356 of the First Report and Order, the Commission confirmed that §251(c)(3) permits IXCs "to purchase unbundled elements ... for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers" (footnote omitted). Nothing in that paragraph conditions such activities on the provision of local service to end users. Rather, it is only because the typical consumer would not want to bear the costs of a second, separate line solely to originate and terminate interexchange calls, and because the nature of the switching UNE is such that it must be used for all of the calls carried to and from the customer over the loop, that loops and/or combinations of loops and switching cannot be used as "pure" substitutes for access.

This is made clear in the First Report and Order, where the Commission observed (¶357, emphasis added) that IXCs

> as a practical matter, will have to provide whatever services are requested by the customers to whom those loops are dedicated. This means, for example, that, if there is a single loop dedicated to the premises of a particular customer and that customer requests both local and long distance service, then any interexchange carrier purchasing access to that customer's loop will have to offer both local and long distance services. That is, interexchange carriers purchasing unbundled loops will ***most often*** not be able to provide solely interexchange services over those loops.

Thus, if the customer were to consent to having separate loops for local and long-distance services, there would be no prohibition against an IXC purchasing a loop solely to provide interexchange service. The same is true for the switching element. In ¶¶12-13 of

[2] *See, e.g.,* Bell South at 12-13 and Time Warner at 4-5.

the Reconsideration Order,[3] the Commission, after quoting from ¶357, continued (emphasis added):

> Similarly, the *First Report and Order* defined the local switching element in a manner that includes dedicated facilities, thereby ***effectively precluding*** the requesting carrier from using unbundled switching to substitute for switched access services where the loop is used to provide both exchange access to the requesting carrier and local exchange service by the incumbent LEC.
>
> 13. Thus we make clear that, ***as a practical matter***, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier.

If the customer – or the customer's interexchange carrier – is willing to incur the cost of a loop and a switching element solely for origination or termination of interexchange calls, nothing in the Commission's decisions would prohibit this on policy grounds.

In any event, the purported public interest justifications for adopting such use restrictions are unsound. They rest on contentions that the above-cost revenues the ILECs presently enjoy from special access are an essential element of universal service support, a contention that has already explicitly been rejected by the Commission.[4] The other "policy" argument for permitting use restrictions is that such restrictions are necessary in order to preserve and encourage facilities-based competition in the transport and special access markets. This argument is simply fatuous. It is belied by the fact that the two largest owners of alternative transport and access facilities – AT&T (through its purchase of TCG) and MCI WorldCom (through its Brooks Fiber, MCImetro and MFS properties) – both vigorously object to use restrictions on UNEs. Furthermore, if the alternative providers of access facilities are dependent on revenue streams in excess of efficient, forward-looking costs – a proposition unproven by either the RBOCs or their

[3] 11 FCC Rcd 13042 (1996).
[4] *See* Sprint's Comments at 8-9; AT&T at 13; and CompTel at 5-8.

allies – that would simply be indicative of uneconomic entry for which there is no public interest justification. On the contrary, MCI WorldCom persuasively argues (at 16-18) that precluding substitution of UNEs for special access would deter, rather than promote, meaningful facilities-based competition.

Nor can §251(g) serve as a basis for the use restrictions championed by the RBOCs and their allies. As Sprint pointed out in its initial comments (at 8), the Commission already decided this matter in the First Report and Order when it held (in ¶362) that the primary purpose of that section is to preserve the rights of interexchange carriers to receive access on equal, non-discriminatory terms from ILECs, rather than to protect ILEC revenues. The Commission so held in the course of rejecting ILEC arguments that until the FCC's access charge regime is explicitly superseded by amended rules, IXCs must continue to pay federal and state access charges indefinitely. In fact, the Commission expressly contemplated in ¶362 that IXCs could use UNEs as substitutes for access. See Sprint's Comments at 8.

GTE argues (at 17-18) that the Eighth Circuit has ruled that §251(g) amounts to a congressional directive that the ILECs are entitled to continue to receive access charges indefinitely, citing the *CompTel*[5] decision at 1073. However, the Court's discussion of §251(g) was pure dictum. In that case, CompTel challenged the FCC's conclusion that IXCs could not use interconnection under §251(c)(2) of the Act solely for the purpose of originating or terminating interexchange calls. The use of unbundled network elements as access substitutes was not at issue (even though the Court mentioned §251(c)(3) in passing in its discussion of §251(g)). One of CompTel's subsidiary arguments was that

[5] *Competitive Telecommunications Association v. F.C.C.*, 117 F.3d 1068 (8th Cir. 1997).

the Commission's interpretation would subvert the goal of cost-based rates in the Act, and it was in that context that the Court interpreted §251(g) in the fashion cited by GTE. But the Commission, in rejecting CompTel's arguments in the First Report and Order, did not rely on §251(g) to support its interpretation of the scope of §251(c)(2), and the Court would be precluded from upholding the Commission on grounds other than those in the Commission's decision.[6] Thus, the Court's discussion of §251(g) was simply gratuitous.

Finally, GTE suggests (at 20-22) that allowing the substitution of UNEs for special access would somehow interfere with the implementation of the proposal for reform of switched access charges advocated by the Coalition for Affordable Local and Long Distance Service ("CALLS"). Sprint is a member of CALLS and a supporter of the CALLS Plan, and wishes to make clear that the CALLS Plan has no relationship whatsoever to the issue here before the Commission. The CALLS Plan is directed at achieving reasonable rates and a more rational structure for switched access charges (of which transport is only a minor part) and has nothing to do with the issue of restrictions on the use of UNEs. The CALLS members, from the outset, did not attempt or purport to include within the Plan all the issues in which interexchange and local exchange carriers have opposing interests. There are a number of contentious issues, which the CALLS members decided, early on, not to try to reach agreement on, such as reciprocal compensation for ISP traffic, the proper X-factor for purposes other than the CALLS Plan, etc. The UNE issue was clearly outside the scope of the CALLS Plan as well; at the time the parties reached agreement on the CALLS Plan, Sprint, for one, believed that

[6] *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

there was no issue at all – that the First Report and Order made clear that there are no restrictions on the use of UNEs. Contrary to GTE's implication, permitting substitution of UNEs for special access, together with adoption of the CALLS Plan, would not threaten universal service objectives, simply because there is no relationship between special access and universal service. *See* Sprint's Comments at 8-10.

CONCLUSION

It is beyond rational dispute that the Commission decided in its First Report and Order that there can be no regulatory or ILEC-imposed restrictions of the use of UNEs. The ILECs lost that issue nearly four years ago, failed to challenge it at the time, and have subsequently lost the many other legal battles they have fought to delay the implementation of the 1996 Act. If the Commission sticks to its course and ignores the cries of woe from the RBOCs, it will advance the level of competition, lower the costs of communications services, and promote the public interest.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY COMMENTS of Sprint Corporation in CC Docket No. 96-98 was sent by United States First-class Mail, postage prepaid, on this 18th day of February, 2000 to the parties listed below.

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